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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 432

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WILSON AND CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General on behalf of the National Labor Relations Board prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 9, 1949 (R. 142), which denied the petition of the Board for enforcement of its order against Wilson and Co., Inc.

OPINIONS BELOW

The opinion of the court of appeals (R. 141) is reported at 173 F. 2d 979. The findings of fact, conclusions of law and order of the Board (R. 68) are reported at 77 N. L. R. B. 959.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1949 (R. 142). The Board's petition for rehearing (R. 142-143) was denied on May 30, 1949 (R. 143). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 144). The jurisdiction of this Court is invoked under Section 10 (e) and (f) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

1. Whether there is substantial evidence to support the Board's findings that the Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them under Section 7 of the Act, in violation of Section 8 (1) of the Act; refused to bargain with the Union, in violation of Section 8 (5) of the Act; and refused to reinstate two employees because of their union activities, in violation of Section 8 (3) of the Act.[1]

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[1] Since the court below did not disclose its reasons for refusing to enforce the Board's order we do not know what grounds moved the court below to deny enforcement. We state the above question as we believe it was the controlling basis for the decision. However, we desire to preserve the right to urge our position respecting such other questions as are involved in the case, as well as to urge that the failure to issue an opinion disclosing the grounds of decision was itself error.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 17-25.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, as amended, the Board on May 28, 1948, issued its findings of fact, conclusions of law and order (R. 68) which may be summarized as follows: [2]

On or about June 12, 1946, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 667, A.F.L., herein called the Union, commenced organizing employees at the Company's cheese factory in Okolona, Mississippi (R. 86-87; B. A. 2-3, 11, 25, C. A. Vol. I, 68-69, Vol. II, 603). On the evening of the following day a majority of the employees attended a union meeting and signed applications for membership (R. 88, 109; B. A. 11, 12). More employees signed applications on the next day (R. 88; B. A. 5, 11).

The Company learned of these union activities promptly. On the first day of the organizational

[2] In the following statement, the record references preceding the semicolons are to the Board's findings; succeeding references preceded by the designation "B. A." are to the supporting evidence in the Board's Appendix, while those preceded by the designation "C. A." are to the supporting evidence in the Company's Appendix (Appendix to Petitioner's Brief in the Court of Appeals).

campaign, Assistant Superintendent Neal observed a number of application cards being delivered to one of the employees and was requested by that employee not to say anything about the matter (R. 86-87; B. A. 11-12, C. A. Vol. II, 518). On the day following the first union meeting, one of the employees informed Neal and Route Manager Cook, another managerial employee of the Company (R. 88; C. A. Vol. I, 147), that all of the employees had gone to the meeting and joined the Union (R. 88; B. A. 12, 13, C. A. Vol. II, 322).

The Company immediately took steps to discourage its employees from organizing. Assistant Superintendent Neal questioned employees Bean, Herron and Hatten, separately, as to whether they were going to join the Union (R. 87; B. A. 17, 19, 30-31), suggested to Hatten that he wait a while before he joined, and, later, asked Hatten whether he had paid his Union dues (R. 87; B. A. 19). In addition, on the day following the first union meeting Route Manager Cook inquired of employee Culpepper as to whether the employees had joined the Union (R. 70, n. 6; B. A. 12-13).

Upon learning that a union meeting was scheduled for the evening of Friday, June 21, the regular pay-day, for the purpose of having the employees pay initiation fees, Plant Superintendent Colbert told a number of the Negro employees that they would not be paid that day and thus would not have

money with which to pay their initiation fees (R. 88-89; B. A. 6, 13, 16, 19, 22, 31). His threat, however, was not carried out and the employees received their checks before they left the plant (R. 89; B. A. 16).

Also, on the same day, the Company put into effect a wage increase of five cents an hour, retroactive to June 14, so that the increase was reflected in the pay checks received on that day (R. 89-90; C. A. Vol. I, 36). The Company's officials had known since March that the increase was to be granted within 60 to 90 days (R. 89-90; C. A. Vol. I, 37, 107). They withheld notice of the raise until June 21 (R. 89; B. A. 14, C. A. Vol. I, 36), however, the day the employees had set for payment of initiation fees (R. 88-89; B. A. 13, 19), for the purpose, as the Board found, "of inducing the employees to abandon self-organization and refuse to pay their initiation fees in the Union" (R. 91; B. A. 6, 16, 19, 22, 31). Nevertheless, a majority of the employees, 16 out of 21 in the appropriate bargaining unit,[3] paid their initiation fees on June 21 and another employee paid his on June 24 (R. 109-110; B. A. 41, C. A. Vol. II, 614).

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[3] The Board found that the Company's maintenance and production employees, excluding office, clerical and supervisory employees, constituted an appropriate bargaining unit (R. 108-109). It rejected the Company's contention that its two "laboratory" employees should be excluded as confidential employees since there was no evidence that these employees have access to confidential information and Plant Manager Bender testified that he knew of no reason why they should not be included in the same unit with production employees (R. 69, 108-109; C. A. Vol. I, 93-94, 234).

On June 23 the Company discharged employee Baugh and his discharge became generally known throughout the plant on the same afternoon (R. 102; B. A. 7, 13, 16, 17-18, 20, 22). Baugh had attended the union meetings of June 13 and 21, had successfully solicited at least three employees to join the Union on June 14, and had otherwise been active in the Union (R. 99; B. A. 2, 3, 5). These circumstances led the other employees to believe that Baugh's discharge was discriminatorily motivated (R. 102; B. A. 13-14, 29).[4] For this reason, upon learning of Baugh's discharge, they ceased work and assembled in the paraffin room to protest Baugh's discharge to Superintendent Colbert (R. 102-103; B. A. 13). Dissatisfied with Colbert's explanation that Baugh had been discharged because "he wasn't worth a damn," one of the employees expressed a desire to see Plant Manager Bender (R. 103; B. A. 7, 14, 17-18, 20). Bender arrived at the paraffin room shortly thereafter and told the employees that all of them who had not already checked out should do so and leave the plant (R. 104-105; C. A. Vol. I, 111-112). Thereupon, as the Board found (R. 107), "all production and maintenance employees then on duty, except James Springer, left their jobs and went on strike because of Baugh's termination of employment."

On the day the strike commenced all but three of the Company's non-supervisory employees at-

[4] The Board, however, found that he had not been discriminatorily discharged (R. 101-102).

tended a special meeting over which Union Organizer Caldwell presided (R. 116; B. A. 7-8, C. A. Vol. I, 70-71, 77, 240). He advised them to assemble at a cafe across the street from the plant early the next morning, June 24, and promised that he would then talk to Plant Manager Bender in an effort to get all the employees back to work (R. 116; B. A. 14, 32, C. A. Vol. II, 549-550). Foreman Springer, who was present at this meeting, informed Bender of what had taken place (R. 117; B. A. 7, C. A. Vol. I, 199-200, Vol. II, 549-550).

Pursuant to the plan, all of the strikers assembled at the designated cafe early the next morning in their work clothes, ready to go to work, and Union Organizer Caldwell conferred with Plant Manager Bender (R. 110-111; C. A. Vol. I, 72). Bender admittedly observed the employees as he talked with Caldwell (R. 70; C. A. Vol. I, 148-149).

Caldwell told Bender that he represented "the boys that left" work on the day before; that they had all joined the Union; that the trouble had arisen in connection with Baugh's discharge; and that if the Company would put Baugh back to work, the rest of the employees would return to work (R. 111; C. A. Vol. I, 72-73, 76-77). Bender replied that he did not know that Caldwell represented the employees; that the employees had quit and that he, therefore, did not have to take them back (R. 111; C. A. Vol. I, 118). During the conversation, Caldwell informed Bender that a "contract" had been mailed to him from the Union's head-

quarters in Memphis, Tennessee, which should be received in the morning mail (R. 111; C. A. Vol. I, 73, 118).

A letter from the Union, dated June 22, 1946, with a proposed contract enclosed, was received by Bender during the morning of June 24 (R. 112; C. A. Vol. I, 118). In the letter, the Union claimed to represent a majority of the Company's employees and requested a conference for the purpose of negotiating in regard to the proposed contract (R. 112; C. A. Vol. II, 603). On June 26, Plant Manager Bender replied that the Company had never inquired into the Union status of any of its employees and could not therefore evaluate the Union's claim to majority representation, that some of the employees might be members of other labor organizations, and that the Company was consequently refusing to recognize the Union as the representative of its employees at that time (R. 112; C. A. Vol. II, 611).

On June 23, Bender and Superintendent Colbert attempted to engage new employees to replace the strikers, but succeeded in obtaining only two who reported on June 24 (R. 113; C. A. Vol. I, 119, Vol. II, 343, 614). Subsequently, on or about July 5, employee Saxon went to the plant and requested reinstatement on his job. Bender refused to rehire him. (R. 121; B. A. 34, C. A. Vol. I, 120). Saxon had been employed by the Company for some three years and eight months as a fireman (R. 121, B. A.

32). He had not been replaced by June 24, the date when, the Board found, the Company had illegally refused to bargain with the Union (R. 123; C. A. Vol. II, 614-615).

Sometime after Saxon had applied for reinstatement, employee Potter went to the plant and asked Bender "for his job back." Bender refused to rehire him. (R. 122; B. A. 37-38, C. A. Vol. I, 120). Potter had been employed by the Company as a janitor for some five or six weeks prior to the strike (R. 121; C. A. Vol. II, 614). Like Saxon, Potter had not been replaced by June 24 (R. 123; C. A. Vol. II, 614-615).

Upon the basis of the foregoing findings of fact, the Board reached the following conclusions:

The Company, in violation of Section 8(1) of the Act, interfered with the rights of the employees as guaranteed by Section 7 of the Act, by the conduct of Assistant Superintendent Neal and Route Manager Cook in questioning the employees concerning their union activities, by Superintendent Colbert's threat to withhold the wages of the Negro employees on the day that their initiation fees were to be paid, and by the timing of a wage increase for the purpose of inducing the employees to abandon self-organization (R. 70).

Since June 21, 1946, the Union has been the duly designated bargaining representative of the Company's employees within an appropriate bargaining unit (R. 110). At the time of the Union's re-

quest for bargaining on and after June 24, 1946, the Company was not acting in good faith in asserting a doubt concerning the Union's majority status, for it had ample reason to know and did know that a majority of its employees had designated the Union as their bargaining representative (R. 70, 114-120). This fact had been communicated by employees to at least two of the Company's four supervisors, Foreman Springer had attended and reported to Plant Manager Bender concerning the June 23 union meeting which was attended by practically all the employees, and Bender admitted seeing the striking employees waiting outside the plant on the morning of June 24 while Union Organizer Caldwell talked to him in their behalf (R. 70). The Company, therefore, in refusing to bargain with the Union on and after June 24, violated Section 8 (5) of the Act (R. 69-70, 127-128).

When the employees went on strike on June 23, they did so in the belief that Baugh had been discriminatorily discharged for union membership and activity. In view of the fact that Baugh was discharged for cause, the strike, when it started, was an economic strike. (R. 107.) It became an unfair labor practice strike on June 24 when the Company illegally refused to bargain with the Union, thus prolonging the strike. Thereafter, the striking employees were entitled to reinstatement upon application if their jobs had not been filled

prior to June 24, when the illegal refusal to bargain occurred. (R. 71.)[5]

Since employees Saxon and Potter had not been replaced while the strike was still an economic one, they were entitled to reinstatement upon application and the Company violated Section 8 (3) in refusing to reinstate them (R. 73, 123).

The Board ordered the Company to cease and desist from engaging in the unfair labor practices found; to bargain collectively with the Union upon request; to offer reinstatement to Saxon and Potter with back pay from the time of their application for reinstatement; to offer reinstatement to the other strikers upon application; to make whole any striking employee who is refused reinstatement for any loss of pay resulting from such refusal to reinstate; and to post appropriate notices (R. 75-78). On June 24, 1948, the Company filed in the court below a petition to review and set aside the Board's

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[5] The Board rejected the Company's contention that the strikers had lost their status as employees because of alleged misconduct during the strike (R. 71). The Company had introduced evidence that after the strikers left the plant, certain switches were found pulled and sought to prove that damage would have resulted to the Company's property if the pulled switches had not been discovered in time (C. A. Vol. I, 41, Vol. II, 531-532). However, no evidence was introduced to connect any of the strikers with the pulling of the switches (R. 71). The Company had also attempted to prove that on one occasion some strikers had attempted to block a road with their cars about five miles from the plant; however, the evidence introduced failed to support the Company's contention (C. A. Vol. I, 214, Vol. II, 358-360). Moreover, the Company did not except to the trial examiner's failure to find that such road block had occurred (R. 57-61).

order (R. 1-16). The Board filed an answer and request for enforcement of its order (R. 17-28). The Court, on May 9, 1949, without stating the reasons for its action, entered its judgment denying the Board's request for enforcement (R. 141-142).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not holding that the Board's findings are supported by substantial evidence.

2. In denying enforcement of the Board's order.

3. In failing to state its reasons for denying the Board's request for enforcement.

REASONS FOR GRANTING THE WRIT

1. As we have pointed out in the petition for certiorari filed in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, this is one of five cases in which the Board is simultaneously petitioning this Court for writs of certiorari. The considerations of public policy set forth in the petition in the *Atlanta Metallic* case support the granting of a writ of certiorari in the present case. For reasons of brevity, they are not restated here, and we respectfully refer the Court to our petition in the *Atlanta Metallic* case.

2. In view of the fact that the court of appeals stated no reason for refusing enforcement of the

Board's order, it is difficult to surmise the basis for the court's action. The primary issue below was one of the substantiality of the evidence. As shown in the Statement (*supra*, pp. 3-11), the Board's findings of fact are clearly supported by substantial evidence on the record considered as a whole.

The Company injected other issues of a minor nature in its brief before the court below.[6] It is doubtful whether the lower court decided the case on these issues, since they involved application of principles of law which are established and are contrary to the Company's position. Thus, for example, the Company contended (Br., p. 6) that it had not received a fair hearing.[7] In support of this contention the Company urged that the trial examiner made erroneous rulings with regard to the admission of evidence (Br., p. 6) and credited all of the Board's witnesses and none of the Company's witnesses (Br., p. 31). But nowhere in the Company's brief filed in the court below did the Company point out in what respects the trial examiner's rulings were erroneous, much less prejudicially erroneous. Similarly, with regard to the

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[6] Copies of this brief, although not a part of the official transcript of the record, are lodged with the Clerk of this Court for the convenience of the Court.

[7] Nowhere in its exceptions (R. 57-61) did the Company contend that it had not been accorded a fair hearing. This contention was therefore barred by the provisions of Section 10 (e) of the Act. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387-389.

credibility of witnesses,[8] the Company's contention is based upon the decision of the Court of Appeals for the Sixth Circuit in *Pittsburgh Steamship Company* v. *National Labor Relations Board,* 167 F. 2d 126, which has since been reversed by this Court, 337 U. S. 656. The court below had itself previously stated the correct rule on this point in *National Labor Relations Board* v. *Robbins Tire & Rubber Co.,* 161 F. 2d 798, 800. See *Pittsburgh Steamship Company* v. *National Labor Relations Board,* 337 U. S., at page 659-660. It is unlikely that the court below intended to depart from its earlier holding in a decision which stated no reason for its judgment.

The Company also contended (Br., p. 24) that the strikers had lost their status as employees because they failed to give the strike notice required by the War Labor Disputes Act (50 U.S.C. 1501, *et seq.*) and, therefore, were not entitled to reinstatement. That such failure has no effect upon the employees' status under the National Labor Relations Act has been decided by the Court of Appeals for the Sixth Circuit in *Hamilton* v.

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[8] The assertion that the trial examiner credited all of the Board's witnesses and none of the Company's witnesses is not true in fact, as shown on the face of the intermediate report adopted by the Board (R. 100, n. 25, 102, n. 24, 103, n. 27). Moreover, the trial examiner overruled the Board's contentions on the important issue of whether Baugh's discharge, which had precipitated the strike, had been a discriminatory one (R. 102), and of whether Bender had discharged the entire group of employees on the afternoon of June 23, when he met them in the paraffin room (R. 107-108).

National Labor Relations Board, 160 F. 2d 465, certiorari denied, *sub nom., Kalamazoo Stationery Co.* v. *National Labor Relations Board,* 332 U. S. 762, and that decision was called to the attention of the court below. It is doubtful whether the court below decided this issue against the Board, for it is reasonable to assume that, had it done so, it would have so stated and would have indicated its disapproval of the decision in the *Hamilton* case. If, however, the court below did hold contrary to that decision, the judgment below presents a conflict between the Fifth and the Sixth Circuits on this point. It should also be noted that an adverse holding by the court below on this issue could in no event be dispositive of the entire case, inasmuch as it could have no effect whatsoever upon the Section 8 (1) violations which the court should have enjoined irrespective of the employees' right to reinstatement after the illegal refusal to bargain.

Finally, the Company contended that the scope of the order was too broad (Br., p. 7). This contention could not possibly have influenced the court below to deny enforcement *in toto,* since, even if the contention were meritorious, the court would have modified the order to limit its scope rather than to deny enforcement.

If, therefore, the case presents any issue other than the substantiality of the evidence, it demonstrates the necessity of having the court below

issue an opinion stating the reasons for its judgment so that the Board may be guided in the administration of a public statute. We believe, however, that the issue is one of substantiality of the evidence, and, in that regard, we respectfully submit that the Board's findings are amply supported by substantial evidence on the record considered as a whole.

CONCLUSION

For the reasons stated above, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. * * *

* * * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order * * * and shall certify and file in

the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court * * * shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any circuit court of appeals of the United States * * * by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), * * * and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended by the Labor Manage-

ment Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have

the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 9. * * *

* * * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both

professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court * * * shall have power * * * to make and enter upon the pleadings, testimony,

and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any circuit court of appeals of the United States * * * by filing in such court a written petition praying that the order of the Board under subsection (e), * * * the such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), * * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

The relevant provisions of the War Labor Disputes Act (57 Stat. 163, 167, 50 U. S. C. App. 1501, *et seq.*) are as follows:

SEC. 8. (a) In order that the President may be apprised of labor disputes which threaten seriously to interrupt war production, and in order that employees may have an opportunity to express themselves, free from restraint or

coercion, as to whether they will permit such interruptions in wartime—

(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

(2) For not less than thirty days after any notice under paragraph (1) is given, the contractor and his employees shall continue production under all the conditions which prevailed when such dispute arose, except as they may be modified by mutual agreement or by decision of the National War Labor Board.

(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit, or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production. The National Labor Relations Board shall include on the ballot a concise statement of the major issues involved in the dispute and of the efforts being made and the facilities being utilized for the settlement of such dispute. The National Labor Relations Board shall by order forthwith

certify the results of such balloting, and such results shall be open to public inspection. The National Labor Relations Board may provide for preparing such ballot and distributing it to the employees at any time after such notice has been given.

(b) Subsection (a) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(c) Any person who is under a duty to perform any act required under subsection (a) and who willfully fails or refuses to perform such act shall be liable for damages resulting from such failure or refusal to any person injured thereby and to the United States if so injured. The district courts of the United States shall have jurisdiction to hear and determine any proceedings instituted pursuant to this subsection in the same manner and to the same extent as in the case of proceedings instituted under section 24 (14) of the Judicial Code.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 432

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

WILSON & CO., INC., RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 7, paragraph 3 of the Rules of the Supreme Court of the United States and within the extended time allowed by this Court in its telegram dated November 30 and its Order of even date, extending the time in which to file Respondent's Brief to December 30, 1949, Respondent, Wilson & Co., Inc., files this, its Brief in Opposition to Grant of the Writ and asserts the following:

1. This Court is without jurisdiction to hear or decide any cases on certiorari, where the sole purpose of the petition for the writ of certiorari is to seek chastisement, castigation, admonishment and reprimand upon the Judges of the Court of Appeals

for the Fifth Circuit with respect to their handling of labor cases generally or in anticipation of N.L.R.B. cases that may come before that Court in the future.

2. The charges made by the Board are groundless in law and without foundation in fact. Such charges are not in accordance with the spirit of Canon Number One of the Canons of Professional Ethics.

3. By the Board's own admission, the instant case is not one which involves matters of general public interest nor is it one on which a petition for a writ of certiorari ordinarily would lie. The instant case should not be treated jointly with any other case but should be treated separately and individually upon its own merits.

4. The failure of the Board to notify Respondent of the Board's intention to seek more time in which to file a petition for a writ of certiorari; and the failure of the Board to notify Respondent of the grant of additional time, is, at the very least, an utter disregard for the spirit of the rules of this Court, and a failure to abide by the customary and recognized courtesies, ethics and practices sufficient to give this Court grounds for denial of the petition.

5. The Board has ignored many legal issues raised before the lower court by the Respondent, any one or a combination of which were sufficient grounds for the Fifth Circuit Court of Appeals to set aside the Board's order.

I.

THE COURT HAS NO JURISDICTION FOR THE PURPOSES ADVANCED BY THE BOARD.

Under point No. 1 in the Board's petition in the instant case, (Pet. page 12), the Board incorporates by reference, its petition in the case of the *National Labor Relations Board* vs. *Atlanta Metallic Casket Company*, No. 431. In the *Atlanta Metallic* case the Board sets forth its reason for seeking the writ. The Board, however, admits in its petition in the *Atlanta Metallic* case that this case is not one of general importance, nor one that of itself warrants the application for a writ of certiorari. The Board has stated in its petition:

> "A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented." (Pet. No. 431, P. 16).
>
> "Nevertheless this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's Order." (Pet. No. 431, p. 10).

Although the Board has stated that these cases are not of sufficient general importance in the administration of the Act to warrant the application for a writ, they nevertheless proceed with their statement that:

"These applications are being made because

> the Fifth Circuit has denied enforcement of or modified Board orders in an inordinately number of cases which have recently been before that Court or petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction." (Pet. No. 431, p. 11).

The Board thus has made it very clear that the sole purpose of filing these petitions for writs of certiorari is to request this Court to admonish and reprimand the Judges of the Court of Appeals for the Fifth Circuit with respect to their handling of labor cases during the past few years. The Board also states as its reason for filing the petitions, that they desire the Judges for the Fifth Circuit to be instructed by this Court to be more generous to the Board in their treatment of cases which the Board brings before them. In other words, what the Board now seeks is to have this Court instruct a lower court on the methods it should use in deciding labor cases, not only in the past, but also any such cases that may come before that lower court in the future.

The Supreme Court is not the proper forum for the determination of the charges made by the Board against the Judges of the Fifth Circuit Court of Appeals in the *Atlanta Metallic* case in its treatment of Point Number 1 (Pet. No. 431, pp. 10-23). If such charges should in fact be brought, they should be brought on impeachment proceedings before the House of Representatives and the Senate

of the United States. The Board charges that the Judges of the Court of Appeals for the Fifth Circuit are deliberately refusing to weigh the requirements of the statutes and are intentionally failing to perform their sworn duties as Judges of a Court of the United States. By its own admission, the Board does not seek review of the individual cases, but merely seeks a castigation and chastisement of the Judges for the Fifth Circuit, which is not justified.

II.

THE CHARGES MADE BY THE BOARD ARE GROUNDLESS AND CONTRARY TO LEGAL ETHICS.

The Board states in its petition that the primary issue in the instant case on appeal to the United States Court of Appeals for the Fifth Circuit was whether the Board's findings are supported by substantial evidence. The Board also states in its brief that the Respondent injected other issues of a minor nature before the Court below. The brief below, of the Respondent, Wilson & Co., Inc., has been filed with the Clerk of this Court and Respondent respectfully refers the Court to this brief. A great many other issues of a legal nature were raised, any one of which or combination were sufficient to set aside the findings of the Board. Likewise the Board in its statement of facts in the instant case has not fully stated the facts, which omissions would tend to mislead the Court. Reference to Respondent's brief below point up these omissions.

Apart and aside from the groundlessness of the charges against the Judges for the Fifth Circuit, it is the opinion of Respondent and its attorneys that such charges made by attorneys against judges do not seem to be in accordance with the duties and spirit of the language of Canon No. 1 of the Canons of Professional Ethics. Canon No. 1 states as follows:

> "It is the duty of the lawyer to maintain towards the courts a respectful attitude not for the sake of the temporary incumbent of the judicial office but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is a proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

The obligation which an attorney assumes when admitted to the Bar is not merely to be obedient to the constitution and the law, but to maintain at all times, the respect to the courts of justice and the judicial officers. (*Neil* v. *State*, 9 Arkansas 259). The habit of criticizing the motives of the judicial officers in the performance of their official duties, when the proceedings are not against the officers whose acts or motives are criticized, tends to sub-

vert the confidence of the community in the courts of justice and in the administration of justice. When such charges are made by an attorney, who is an officer of the court, and who is bound by his duty to protect the administration of justice, the attorney making such charges is guilty of professional misconduct. (*Matter of Rockmore*, 127 App. Div. 499, 111 N.Y.S. 879). The mere raising of charges of this kind in a proceeding of this type should be sufficient grounds for denial of the writ of certiorari in the instant case.

III.

THE INSTANT CASE INVOLVES NO MATTER OF GENERAL PUBLIC INTEREST OR IMPORTANCE.

By the Board's own admission, the instant case is not one which involves matters of general public interest, nor is it one on which a petition for writ of certiorari would ordinarily lie. Respondent concurs with the Board in these statements. This admission by the Board is sufficient grounds for a denial of the writ by this Court.

Respondent objects to any attempt by the Board to tie in the instant case with any other cases and submits that on the basis of statements made by the Board in its petition, that, standing alone, the instant case is not of sufficient general importance to warrant the grant of a writ. Respondent submits that each case should be decided upon its own merits and should not be tied in with other cases for purposes not within the jurisdiction of this

Court. Respondent can reach only one conclusion as to the reasons for the Board's attempt to tie in this case with four other cases, in petitioning for a writ of certiorari. That reason can be only that they hope to add weight to their arguments by pure numbers, concerning the decisions rendered by the Court of Appeals for the Fifth Circuit in labor cases.

IV.

FAILURE OF THE BOARD TO NOTIFY RESPONDENT OF EXTENSION OF TIME FOR FILING PETITION IS IMPROPER

The final order in the United States Court of Appeals for the Fifth Circuit was entered on May 30, 1949 when the Board's petition for rehearing was denied. On August 26, according to the petition in the instant case, the Chief Justice granted the Board until October 28, 1949 within which to file its petition for a writ of certiorari. Respondent was not apprised of this fact, nor that a petition had been filed until it read a release in a daily labor service. No formal notification was given Respondent before the petition was filed. The petition herein was received on November 7, 1949.

Respondent submits that the failure of the Board to notify Respondent of its intention to apply for a writ of certiorari and for more time in which to file its petition and the further failure of the Board to notify Respondent of the granting of additional time, is an utter disregard by the Board of the spirit of the rules of this Court, and a failure to

abide by the customary and recognized courtesies, ethics and practices among attorneys. This, in itself, furnishes sufficient grounds for this Court to deny the application for a writ of certiorari.

V.

THE BOARD HAS IGNORED MANY LEGAL ISSUES RAISED IN THE LOWER COURT

In the petition in the instant case, the Board, at pages 12-16, attempts to minimize all the legal issues which were brought before the Court of Appeals and which furnished the basis for denying enforcement of the Board's decision. Among the issues omitted were the following:

1. Was there sufficient evidence to support the Board's finding on the record as a whole?

2. Was the Bender letter of June 26, 1946 a refusal to bargain? (T. 112-113).

3. Was the Respondent under any duty to bargain with the union concerning the Baugh incident, and did its refusal to talk about this incident after the strike started, convert the strike into an unfair labor practice strike?

4. Since there was no unconditional offer to return to work, did the union lose its majority status by the replacement of the former employees? Did the Company then have any duty to bargain?

5. Was the Trial Examiner biased and prejudiced?

6. Was there any violation of Section 8(a)(1)

of the Act due to certain isolated alleged acts by the Company and its agents?

7. If there were violations of Section 8(a)(1) of the Act, did these violations cause or prolong the strike, thereby turning the strike into an unfair labor practice strike?

8. Was the unit found by the Board an appropriate unit?

9. Did the union request the Respondent to bargain?

10. Was the strike on June 23, 1946, protected as a concerted activity?

Each of these legal questions was raised before the Court of Appeals. A determination of these questions in favor of Respondent, either in part or completely, were sufficient to set aside the Board's findings.

CONCLUSION

For reasons stated herein, Respondent respectfully urges that the writ be denied.

Respectfully submitted,

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Dated: DECEMBER 27, 1949.